EVIDENCE—DISPUTABLE PRESUMPTIONS; CAN THEY BE WEIGHED?—The evidential force of presumptions under the California Civil Code, 1961, was considered and the statute construed in *Everett* v. *Standard Accident Insurance Co.*, —— Cal. ——, 187 Pac. 996.

The defense to an action on an insurance policy, by one claiming to be the wife of the insured, was that she did not have that relationship because the marriage ceremony under which she claimed occurred while the insured had another wife then living. The question arose as to the effect upon the determination of this question of fact of the presumption that the deceased did not commit a crime in consummating the second marriage. The code provision is as follows: "A presumption (unless declared by law to be conclusive) may be controverted by other evidence, direct or indirect, but unless so controverted the jury are bound to find according to the presumption." The code defines a presumption as, "A deduction which the law expressly directs to be made from particular facts." It is to be noted that these two provisions were really intended as but statutory declarations of the general rule of law then existing.

The court construed this statute as requiring the presumption to be weighed as evidence; that the words of the code, "other evidence," meant evidence to be weighed against the presumption as evidence. To use the language of the court in illustrating the principle to be applied, "Thus the presumption of innocence of crime will support a verdict of acquittal in a criminal case, though no evidence is offered to controvert the case of the prosecution."

Professor Greenleaf started us on a legal heresy when he made the statement that "This presumption of innocence is to be regarded by the jury, in every case, as matter of evidence, to the benefit of which the party is entitled." GREENLEAF ON EVIDENCE, § 34. If a court were to instruct a jury to weigh the presumption of innocence in the defendant's favor, where there was evidence tending to show guilt, what could it possibly mean to a jury or anyone else? Can the presumption of innocence have one measure of probative value in one case and a different one in some other case? Has it specific or variable weight? If a variable weight, what are its variable factors? To weigh it is to determine its weight, which means that it is likely to have different measures of probative value in different cases. If a juror, on getting an instruction to weigh the presumption, should request the court to explain what it meant by the instruction, what consideration should determine its weight, is there any possible thing the court can say in answer? One can attach one measure of probative value or another to a particular fact, but is it thinkable that this can be done to the presumption of innocence?

The language of the court quoted above that the presumption of innocence will support an acquittal without evidence to controvert that of the prosecution means, and only can mean, that unless the prosecution in such a case has produced evidence of sufficient probative value to enable the jury to find guilt beyond a reasonable doubt, the defendant must be acquitted. The presumption of innocence has nothing to do with that conclusion save to make

it necessary for the prosecution to produce evidence for the jury to weigh if it would make a case for their consideration at all.

The rule of the presumption under consideration operates only in the absence of evidence opposed to the required conclusion. Where there is such opposing evidence the law ceases to demand the conclusion. The presumption must then disappear and the contested fact must be determined upon the evidence submitted. *State* v. *Quigley,* 26 R. I. 263.

Though the presumption under such circumstances disappears, the *facts* to which the presumption attaches still remain in the case. Their natural probative value is to be considered. Usually that probative value will be considerable, else the law would not have raised the presumption.

The fallacy of the line of reasoning adopted in the case under discussion was so clearly pointed out by the late Professor Thayer in his address before the Yale Law School, with the case of *Coffin* v. *United States,* 156 U. S. 432, as a text, that little can be added. See THAYER'S PRELIMINARY EVIDEKCE AT THE COMMON LAW, 551. It is interesting to compare *Holt* v. *United States,* 218 U. S. 245, 253, with the opinion in the *Coffin* case. The court still seems to be of the same opinion as to what is the law, but thinks it law the jury will not be likely to understand and that it is better not to let them try. See also in this same connection the earlier opinion in *Agnew* v. *United States,* 165 U. S. 36, rendered shortly after the publication of the address of Pro fessor Thayer above referred to. Citation to some of the later cases follows.

In accord with the case under discussion, *Grantham* v. *Ordway,* —— Cal. ——, 182 Pac. 73; *Cowdry's Will,* 77 Vt. 359. *Contra, Duggan* v. *Bay State Ry.,* 230 Mass. 370 ("The presumption of due care is not itself evidence. It is a simple rule to which resort is had when there is a failure of evidence; it is not evidence, but a rule about evidence"); *Frank* v. *Wright,* 140 Tenn. 535; *Keliher* v. *United States,* 193 Fed. 8, 23. A unique doctrine is that announced in the opinion in *Kauffman* v. *Logan,* —— Iowa, ——, 174 N. W. 366, where the court says that where there is a conflict in the evidence over the existence of a particular fact, such as that it is equally balanced between the parties, that the jury should find the fact established in accordance with the presumption, if one has been operative in the case. In other words, assuming that the burden of proof upon the question of whether the fact exists is upon the party in whose favor the presumption exists, then the jury should be told that they must find for him, even though it cannot say that the preponderance of the evidence is with him. A statement which seems to refute itself.

V. H. L.

PRIVILEGED COMMUNICATION BETWEEN ATTORNEY AND CLIENT—QUESTION OF WHETHER THE RELATION EXISTS LEFT TO JURY—PARTY ALLOWED TO ASSIGN ERROR ON RULING VIOLATING THE PRIVILEGE.—This procedure was justified in the opinion in *State* v. *Snook* (Court of Errors and Appeals of N. J., 1920), 109 Atl. 289. Snook was on trial for manslaughter charged as having been committed by the reckless driving of an automobile. After the act, Mimmick,